UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: FIRSTENERGY SOLUTIONS CORP., *et al.*,[1] Debtors,	Chapter 11 Case No. 18-50757 (Jointly Administered) Hon. Judge Alan M. Koschik
FIRSTENERGY SOLUTIONS CORP., Plaintiff, v. BLUESTONE ENERGY SALES CORP. Defendant.	Adversary No. 18-5100

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT I OF THE ADVERSARY COMPLAINT

Plaintiff FirstEnergy Solutions Corp. ("FES" or "Plaintiff"), a debtor in the above-captioned chapter 11 case, through its undersigned counsel, respectfully submits this memorandum in opposition to Defendant's Motion to Dismiss Count I of the Adversary Complaint (the "Motion"), filed by Bluestone Energy Sales Corp. ("Bluestone" or "Defendant") on January 28, 2019 [Dkt. No. 7].

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; FirstEnergy Generation, LLC ("FG") (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC ("NG") (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company ("FENOC") (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186); and Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors' address is: 341 White Pond Dr., Akron, OH 44320.

PRELIMINARY STATEMENT

In an attempt to avoid turning over approximately $3 million that it already acknowledged in writing was FES's property, Bluestone asserts that FES's claim for turnover under section 542 of the Bankruptcy Code should be dismissed because now, for apparently the first time, Bluestone "vehemently disputes" that it owes the Final Payment (defined below) to FES. Bluestone's dispute, however, is not a *bona fide* dispute and does not support dismissal of FES's claim for turnover under section 542. Instead, Bluestone has manufactured a dispute to evade this Court entering an order requiring it to turn over property of the estate. In essence, Bluestone argues that the Court should dismiss FES's claim simply because Bluestone now says the claim is disputed, despite evidence by Bluestone's own hand to the contrary. The law does not allow a defendant in a turnover action to defeat a claim simply because the defendant, in its motion papers, alleges that the claim is "disputed." Yet that is exactly what Bluestone has done here.

Reviewing the facts alleged in the Complaint, FES has adequately pleaded a cause of action for turnover under section 542 of the Bankruptcy Code. Under the terms of the Agreement, Bluestone was required to accept all 130,771 tons of coal in the stockpile by February 28, 2017. If any coal remained in the stockpile as of that date, Bluestone was to pay FES for the remaining coal by March 7, 2017, at a price of $40 per ton. In a March 2, 2017 letter to FES, Bluestone acknowledged that 77,059.94 tons of coal remained in the stockpile and that it owed FES payment for that coal. Because the price Bluestone was to pay for the coal was fixed at $40 per ton, Bluestone's acknowledgement that 77,059.94 tons of coal remained in the

stockpile set the amount payable to FES to $3,082,397.60.[2] These facts, set forth in the Complaint, require that Bluestone's Motion be denied.

Bluestone attempts to bolster its motion by, in essence, re-writing the Complaint to assert its own "facts" and rely on documents that it deems helpful to its argument. Reliance on purported facts and documents outside the Complaint, however, is inappropriate on a Rule 12(b)(6) motion. Indeed, Bluestone includes over seven pages of facts, only one of which references facts actually asserted in the Complaint. The other six pages contain information never referenced in the Complaint and, in many instances, not relevant to this adversary proceeding. Bluestone also inappropriately relies on five documents it attaches to the Motion. These documents are not referenced in the Complaint nor are they central to FES's claims, as is necessary before the Court can consider them for purposes of the Motion.

Finally, despite Bluestone's contention otherwise, FES's claim for turnover under section 542 is not a garden variety breach of contract claim: there is no need to establish liability (and liability is certainly not disputed) when Bluestone has already acknowledged the Final Payment belongs to FES. Reviewing the facts in a light most favorable to FES, FES has pleaded an adequate claim for turnover, and the Court should deny Defendant's motion to dismiss Count I of the Complaint.

[2] Despite this contemporaneous acknowledgement of its obligation to pay and the amount owed, Bluestone now denies owing FES the Final Payment, claiming that it "specifically denies removing any coal from the stockpile and then not making an appropriate payment for that coal to FES." Bluestone further claims that there are no "significant tons" of coal remaining in the stockpile. This makes no sense. As of March 2, 2017, Bluestone admitted that there were 77,059.94 tons of coal remaining in the stockpile, yet Bluestone now claims that there is no coal in the stockpile and that it did not remove any coal from the stockpile for which it did not compensate FES. If Bluestone's claims are true (and they are not), what happened to the roughly 77,000 tons of coal? Bluestone seems to suggest that the coal simply disappeared and that FES bore the risk that it would lose more than $3 million if that happened. This is not what the Agreement plainly states and is certainly not what FES agreed to. Indeed, under the terms of the Agreement, Bluestone must pay FES for all coal *remaining in the stockpile as of February 28, 2017,* whether the coal in the stockpile was sold or not. Thus, whether the coal was subsequently sold or removed—or, as Bluestone seems to claim, simply disappeared—is irrelevant.

FACTUAL BACKGROUND

On October 10, 2016, Bluestone and FES entered into a Coal Purchase Agreement (the "Agreement"), under which Bluestone and FES agreed that Bluestone would purchase from FES 130,771 tons of coal (the "Purchased Tons") that FirstEnergy Generation LLC ("FG") had previously purchased from Bluestone. (Compl. ¶ 7; Compl., Ex. A § 1.) The Purchased Tons were located at a stockpile on Bluestone's property, the Bent Mountain Operation located near Meta, Kentucky, held for FG's benefit, pursuant to a prior agreement between Bluestone and FG (as assignee of Monongahela Power Company). (Compl. ¶ 8.) Effectively, Bluestone was to buy back the coal it had previously sold to FES, agreeing to pay FES after Bluestone was able to sell the coal to Bluestone's third-party customers. (Compl. ¶ 9.) Regardless of whether Bluestone sold or delivered all of the Purchased Tons to third parties, however, it was contractually obligated to accept all of the Purchased Tons left at the stockpile "in no event later than February 28, 2017." (Compl. ¶ 9; Compl., Ex. A § 2.) If any amount of the Purchased Tons remained at the stockpile as of February 28, 2017, Bluestone was required to pay FES for such coal by March 7, 2017 (the "Final Payment Date") at a rate of $40 per ton (Compl. ¶¶ 10-11; Compl., Ex. A §§ 2, 4.) Nothing in the Agreement gave Bluestone permission to withhold the final payment; even if Bluestone had not sold or not delivered the coal remaining at the stockpile as of February 28, 2017, it was required to pay FES for the full value of the remaining coal. (*See* Compl., Ex. A § 2.) To put it another way, what happened to the coal left in the stockpile after February 28, 2017, was immaterial under the Agreement. (*See* Compl. ¶ 10; Compl., Ex. A § 2.)

As of March 2, 2017, two days after Bluestone was contractually obligated to accept the remaining Purchased Tons and five days before the Final Payment Date, roughly 77,059.94 tons of coal of the Purchased Tons remained at the stockpile (the "Remaining Tons"). (Compl. ¶ 12;

see Compl., Ex. A § 2.) FES became aware of the Remaining Tons when, in or around March 2, 2017, Bluestone's Vice President of Treasury, Summer Harrison, sent a letter to FES acknowledging that Bluestone had possession of a "significant amount of coal in inventory that it [wa]s waiting to ship." (Compl. ¶¶ 13-14; Compl., Ex. B.) Bluestone acknowledged that it intended to deliver the Remaining Tons to its customers by April 15, 2017, (Compl. ¶ 13.), and agreed to send the payment for the Remaining Tons to FES after the coal was shipped. (Compl., Ex. B.) Thus, by Bluestone's own admission, it owed FES payment for 77,059.94 tons of coal, which at the contractual price of $40, amounted to a total of $3,082,397.60 (the "Final Payment") (Compl. ¶ 15; Compl., Ex. B.) Although Bluestone's correspondence appears to suggest otherwise, the Agreement does not allow Bluestone to withhold the Final Payment pending sale and delivery of the Remaining Tons. (*See* Compl., Ex. A § 2.) Regardless, and despite having attested that it would deliver the Final Payment around April 2017, Bluestone has continued to retain the Final Payment. (Compl. ¶¶ 16-17, 20.)

STANDARD FOR A RULE 12(B)(6) MOTION TO DISMISS

On a Rule 12(b)(6) motion, the facts FES alleges in the Complaint must be taken as true, and the Court must consider the allegations in light most favorable to FES. A complaint survives a Rule 12(b)(6) motion if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[W]hen considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court must 'construe the complaint in the light most favorable to the plaintiff and accept all factual allegations as true.'" *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015) (quoting *Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 403 (6th Cir. 2014)). A court must deny a motion to dismiss

unless it determines that "the plaintiff undoubtedly can prove no set of facts in support of [its] claims that would entitle [it] to relief." *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993).

ARGUMENT

I. FES Has Adequately Pleaded a Claim for Turnover Under Section 542

Under section 542(a) of the Bankruptcy Code, "an entity . . . in possession, custody, or control, during the case, of property that the trustee [or debtor in possession] may use . . . shall deliver to the trustee [or debtor in possession], and account for, such property or the value of such property . . . ." 11 U.S.C. § 542.[3] Under section 542(b), "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to . . . the trustee [or debtor in possession] . . . ." 11 U.S.C. § 542(b). To succeed on a claim for turnover, a trustee or debtor in possession must show "(1) that the property is or was in the possession, custody or control of an entity during the pendency of the case[;] (2) that the property may be used by the trustee [or debtor in possession] in accordance with § 363 or exempted by the debtor under § 522; and (3) that the property has more than inconsequential value or benefit to the estate." *Bailey v. Suhar (In re Bailey)*, 380 B.R. 486, 490 (B.A.P. 6th Cir. 2008). Bluestone does not argue that the Complaint fails to establish the second or third elements, i.e., that FES can use the Final Payment or that the Final Payment has more than inconsequential value. Bluestone contends that the Complaint has failed to allege that the Final Payment is estate property. Bluestone is incorrect.

Bluestone argues that the Final Payment is not property of the estate because it "disputes" that FES is entitled to the Final Payment. (Def. Mot. at 10-11.) FES recognizes that most courts

[3] As with trustees, section 542 "authorizes courts to order the turnover of property of the estate to chapter 11 debtors." *See In re Nurses' Registry & Home Health Corp.*, 533 B.R. 590, 597 (Bankr. E.D. Ky. 2006).

have concluded that a debtor cannot use the turnover provision to demand assets that are subject to a bona fide dispute. *See, e.g.*, *U.S. v. Inslaw, Inc.*, 932 F.2d 1467, 1472 (D.C. Cir. 1991) ("It is settled law that the debtor cannot use the turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute."); *cf In re Nurses' Registry*, 533 B.R. at 597-98 (rejecting the conclusion in *Inslaw* and noting that "authorities that do bind this Court hold that debtors can invoke § 542 where title is in dispute"). Key to this determination, however, is that the dispute must be legitimate. *See, e.g.*, *Dayton Title Agency, Inc. v. Phila. Indem. Ins. Co. (In re Dayton Title Agency, Inc.)*, 264 B.R. 880, 883 (Bankr. S.D. Ohio 2000) (noting that there must be a bona fide dispute to overcome a turnover claim); *LaMonica v. CEVA Grp. Plc (In re CIL Ltd.)*, 582 B.R. 46, 118 (Bankr. S.D.N.Y. 2018) (denying a motion to dismiss where the defendant failed to establish, based on the facts alleged in the complaint, that there was a bona fide dispute) *see also Giuliano v. Fairfield Grp. Health Care Centers Ltd. P'Ship (In re Lexington Healthcare Grp., Inc.)*, 363 B.R. 713, 716 (Bankr. D. Del. 2007) ("A 'bona fide dispute' exists when there is a 'genuine issue of material fact that bears upon the . . . liability, or a meritorious contention as to the application of law to undisputed facts.'" (citing *B.D.W. Assocs. v. Busy Beaver Bldg. Ctrs., Inc.*, 865 F.2d 65, 66 (3rd Cir. 1989))).

A defendant seeking to dismiss a turnover claim "cannot resist section 542(b) by *manufacturing* a dispute where there in fact is none. And simply resisting recovery is not enough to create a legitimate dispute." *In re Legal Xtranet*, 2011 WL 3236053, at *1 n.1 (Bankr. W.D. Tex. July 26, 2011) (emphasis in original). "The fact that a defendant may deny the existence of a debt is irrelevant as 'long as . . . allegations state the existence of a mature debt.'" *Kids World of Am., Inc. v. Georgia Dep't of Early Care & Learning (In re Kids World of Am., Inc.)*, 349 B.R. 152, 163 (Bankr. W.D. Ky. 2006) (citing *In re Cambridge Capital, LLC*, 331 B.R. 47, 57 (Bankr.

E.D.N.Y. 2005)); *Corzin v. Rawson (In re Rawson)*, 40 B.R. 167, 169 (Bankr. N.D. Ohio 1984) ("The trustee's complaint clearly alleges that [the defendants] owe a matured debt that is property of the estate. The mere fact that the defendants deny these allegations does not take the trustee's action outside the scope of section 542(b)."). Allowing a defendant merely to state in its motion to dismiss that it disputes a payment or debt "would mean that a defendant could defeat all turnover claims by merely denying that money was owed." *In re Kids World of Am.*, 359 B.R. at 164.

Bluestone's "dispute" is not a *bona fide* dispute, but is manufactured so that Bluestone can now avoid payment—two years after admitting that it owed the Final Payment to FES. Indeed, Bluestone offers no support from the facts alleged in the Complaint that it has ever disputed that the Final Payment is FES's property. Instead, Bluestone effectively submits that merely stating in its motion papers that there is a dispute is enough for the Court to dismiss FES's turnover claim. That Bluestone now "vehemently disputes" that it owes the Final Payment to FES, however, is not a sufficient basis on a Rule 12(b)(6) motion to dismiss FES's turnover claim, especially when this directly contradicts facts alleged in the Complaint (e.g., that Bluestone *did not* dispute that it owed the Final Payment (*see* Compl. ¶ 15)).[4] To find otherwise would allow all defendants to defeat turnover claims by merely denying that money is owed.

Indeed, courts have denied motions to dismiss turnover claims where the alleged facts are even less favorable than they are here. For example, in *Am. Home Mortgage Corp. v. Showcase of Agents, L.L.C. (In re Am. Home Mortgage)*, a plaintiff's allegation that the defendants "are in

[4] As stated below, Bluestone cannot rely on its own alleged facts and documents to bolster its argument that there is a bona fide dispute. Nevertheless, none of the documents Bluestone attaches to the Motion establishes that Bluestone has ever disputed that it owes the Final Payment to FES. Indeed, Exhibit 5 of Defendant's Motion actually supports that Bluestone has never disputed that it owed FES the Final Payment. In that document, faced with the contention that Bluestone owed FES over $3 million, Bluestone did not deny that it owed this amount but agreed that it owed money to FES. Thus, even if the Court were to consider these documents, Bluestone still has done nothing more than assert there is a dispute, without any supporting evidence.

possession of [plaintiff's funds] and that they have no right to such possession" sufficed to state a claim for turnover under section 542 of the Bankruptcy Code. 458 B.R. 161, 169 (D. Del. 2011). The court ruled that "[w]hile a legitimate dispute may exist, the motion to dismiss is limited to the facts alleged in the complaint," and "[t]he complaint fail[ed] to indicate or imply any dispute over ownership of the [property]." *Id.* Therefore, the court denied defendant's motion to dismiss the turnover claim. *Id.* Similarly, in *In re CIL Ltd.*, the court determined that the defendant's "mere denial of [the plaintiff's] entitlement to the [property] without explanation or support by any documentary evidence is insufficient grounds to find that, for purposes of the Rule 12(b)(6), [the plaintiff's] right to the [property] is the subject of a bona fide dispute." 582 B.R. at 118. In that case, the defendants were able to point to annual reports (of which the court could take judicial notice) in which the defendant "explicit[ly] state[d] . . . that [it] dispute[d]" the plaintiff's claim to the property in question. *Id.* This was still not enough to overcome the plaintiff's turnover claim on a motion to dismiss. *Id.* FES's turnover claim is even stronger than the claims brought in *In re Am. Home Mortgage* and *In re CIL Ltd.* because here, Bluestone acknowledged in writing that it owed the Final Payment to FES. (Compl. ¶ 15.) That Bluestone now completely denies that it owes anything to FES is not only insufficient to dismiss FES's turnover claim, but is wholly inconsistent with Bluestone's prior, contemporaneous acknowledgement.

The argument that Bluestone asserts in its motion appears to be wholly inconsistent with the underling facts. On March 2, 2017, Bluestone sent a letter to FES admitting that 77,059.94 tons of coal remained at the stockpile. (Compl. ¶ 14; Compl., Ex. B.) Under the terms of the Agreement, as of February 28, 2017, two days before Bluestone sent this letter, Bluestone was to take ownership of any coal remaining in the stockpile (i.e., 77,059.94 tons) and pay FES the contractually agreed price of $40 per ton. (Compl. ¶¶ 10-11; Compl., Ex. A §§ 2, 4.) Thus,

Bluestone necessarily admitted that it owed FES $3,082,397.60. In the face of those facts, Bluestone now asserts that it disputes that it owes the Final Payment to FES because (i) it never withheld a payment to FES for coal sold from the stockpile and (ii) there are no "significant tons" remaining at the stockpile. (Def. Mot. at 6.) This is nonsensical. If there is no coal remaining in the stockpile today, but there were 77,059.94 tons on March 2, 2017, Bluestone seems to suggest that the coal simply vanished. Regardless of what happened to the coal after February 28, 2017—which had no effect on Bluestone's obligation to pay FES for the Remaining Tons—Bluestone acknowledged in March 2017 that it owes FES $3,082,397.60. Bluestone's baseless claim in the Motion that it paid FES for all coal removed from the stockpile does not change this fact.

Bluestone also asserts that FES's turnover claim "is nothing more than a simple breach of contract claim." (Def. Mot. at 11.) This is not, however, a garden variety breach of contract claim, i.e., a claim "wherein the right to property—i.e., money—is in dispute," *see Bohm v. The Horsley Co. (In re Groggel)*, 333 B.R. 261, 268 (Bankr. W.D. Pa. 2005), because the right to the Final Payment is not in dispute. (*See* Compl. ¶ 15; Compl., Ex. B.)[5] Thus, even though FES pleads breach of contract in the alternative to its turnover claim, this is not a "simple breach of contract claim" where liability needs to be established—Bluestone already admitted that it was liable to FES for the Final Payment. (Compl. ¶ 15; Compl., Ex. B.)

Here, the Complaint adequately alleges a turnover claim. The Complaint pleads that Bluestone (i) owed the Final Payment to FES as of March 7, 2017, (Compl. ¶ 10),

[5] That FES asserted a breach of contract in the alternative is also not enough, on its own, for the Court to conclude that there is not a valid turnover claim. *See, e.g.*, *In re Rawson*, 40 B.R. at 169 (finding that the plaintiff adequately alleged a turnover claim despite the fact that it had also raised a breach of contract claim). [A] pleading does not become insufficient by reason of a party having made alternative, or even contradictory, claims." *Detroit Tigers, Inc. v. Ignite Sports Media, LLC*, 203 F. Supp. 2d 789, 793 (E.D. Mich. 2002) (citing *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 92 (6th Cir. 1920)); *see also* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically . . . .").

(ii) acknowledged that the Final Payment was FES's property, (Compl. ¶ 15; Compl., Ex. B), and (iii) has failed to turn over the Final Payment to FES, (Compl. ¶¶ 16-17, 20). Bluestone's contention that there is a dispute because it says so is not a valid basis to dismiss FES's turnover claim. FES has adequately pleaded a claim for turnover of estate property under section 542, and the Court should deny the Motion.

II. The Court Should Not Consider Facts and Documents Outside the Complaint

To manufacture a dispute, Defendant improperly relies on facts and documents outside the Complaint. When reviewing a motion to dismiss, "a district court may not consider matters beyond the complaint." *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008); *Passa v. City of Columbus*, 123 F. App'x 694, 697-98 (6th Cir. 2005) (concluding that the district court's determination that the plaintiff had not stated a claim was based on evidence favorable to the defendant and outside the complaint, and thus vacating the district court's grant of defendant's Rule 12(b)(6) motion); *Kostrezewa v. City of Troy*, 247 F.3d 633, 643 (6th Cir. 2001) ("If the district court simply took the defendants' assertion in their motion to dismiss as true . . . then it both mischaracterized the plaintiff's complaint and improperly looked outside the complaint in deciding a case on Rule 12(b)(6) grounds."). "However, a court may consider exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, *so long as* they are referred to in the complaint and are central to the claims contained therein . . . ." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016) (emphasis added). Here, therefore, in ruling on Bluestone's Motion, the Court should consider the Complaint and the three exhibits attached thereto, not the facts or exhibits on which Bluestone improperly relies.[6]

[6] This Court may consider the facts and documents on which Bluestone relies, but only after converting the Motion to a motion for summary judgment. "If the district court considers evidence outside the complaint, it

Defendant's Motion improperly relies on facts and documents that are foreign to the Complaint. Indeed, the Motion relies almost *exclusively* on facts not contained in the Complaint. Specifically, Sections I, II, IV, and V of the factual background contain facts foreign to the Complaint. As just one example, Bluestone discusses the potential effect of handling and storing coal in wet and cold months, noting that the parties "understood and necessarily agreed that over time the mass and the value of the stockpile would shrink." (Def. Mot. at 5-6.) The Court will not find this assertion in the Complaint (or the documents attached thereto), nor is it central to either of FES's two claims. Additionally, the Agreement contradicts some of the "facts" that Bluestone raises in its Motion. For example, Bluestone argues that it "underst[ood] . . . the parties' agreement [to mean] that Bluestone owed FES for [the Final Payment] only upon Bluestone's subsequent resale of that coal." (Def.'s Mot. at 5.) As asserted in the Complaint—and as explicitly stated in the Agreement—Bluestone was to pay FES for the Remaining Tons *regardless* of whether it resold the coal. (Compl.¶ 10; Compl., Ex. A § 2.)

Defendant also attaches several documents not referenced in the Complaint or central to FES's claims that it similarly relies on in support of its Motion. These documents include:

- Coal Sales Agreement, effective May 1, 2016, between Monongahela Power Company and Bluestone (Exhibit 1 to Defendant's Motion)
- Agreement to Terminate Coal Sales Agreement, effective September 21, 2016, between Bluestone and FG (Exhibit 2 to Defendant's Motion)
- November 29, 2016 email from FES to Bluestone (Exhibit 4 to Defendant's Motion)[7]

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effectively converts the motion to dismiss to a motion for summary judgment." *Winget*, 537 F.3d at 576. If the court decides to convert the motion to a Rule 56 motion, it must give the parties a "reasonable opportunity to represent all material made pertinent to such a motion by Rule 56." *Id.* (internal citations and quotations omitted); *see* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."); *Passa,* 123 F. App'x at 697 n.1; *Kostrzewa*, 247 F.3d at 643-44.

[7] This exhibit seems to be mistakenly marked "Exhibit 5."

- June 2, 2017 email from Bluestone to FES (Exhibit 5 to Defendant's Motion)

- Article by Una Nowling, titled "Who Moved by Btus? The Pitfalls of Extended Coal Storage" (Exhibit 6 to Defendant's Motion)

Defendant is not permitted to rely on documents not referenced in the Complaint or central to FES's claims. Nor is it allowed to assert completely *new*—and sometimes contradictory—facts to supplement the facts FES adequately pleads in the Complaint. Accordingly, FES requests that the Court strike the documents identified above and the "facts" Bluestone alleges in Sections I, II, IV, and V of its factual background and exclude the material derived therefrom from its consideration of the Motion. Should the Court, nevertheless, find it appropriate to consider the facts asserted by Bluestone, FES requests that the Court convert the Motion to a motion for summary judgment to allow FES to take discovery and respond to Bluestone's assertions.

CONCLUSION

FES respectfully requests that the Court deny Defendant's motion to dismiss Count I of the Complaint.

Dated: February 21, 2019

Respectfully submitted,

/s/ Kate M. Bradley

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